IN THE MATTER OF ARBITRATION BETWEEN

PAN-O-GOLD BAKERY COMPANY	)	
"Employer"	)	Holiday Pay
	)	
AND	)	FMCS CASE NO.
	)	050418-02967-7
B.C.T.G.M. LOCAL NO. 22	)	
"Union"	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: November 29, 2005; St. Cloud, MN

DATE OF POST-HEARING BRIEFS: January 8, 2006

APPEARANCES

FOR THE EMPLOYER: Edward J. Bohrer, Attorney
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THE ISSUE

Did the Company violate the contract when it refused to pay the Grievant, Charles Kauder, for the holiday not worked on Thanksgiving 2004 and, if so, what is the remedy?

INTRODUCTION

The B.C.T.G.M. Union Local 22 (the "Union") and Pan-O-Gold Baking Company, St. Cloud (the "Company") are parties to a labor agreement effective March 1, 2003 through February 28, 2008.

The Union, on behalf of employee Charles Kauder (the "Grievant") filed a grievance dated November 26, 2004 alleging that the Company violated Article 12, Section (b) of that contract. The Company denied the grievance and the parties have proceeded to arbitration.

The parties stipulated and agreed that the arbitration was properly before the Arbitrator.

FACTS

The facts in this matter are undisputed. The Grievant is a union steward and works in the maintenance department. He worked the necessary scheduled hours on Monday, Tuesday, Wednesday and Friday of the Thanksgiving week in 2004. He did not work on Thursday, November 25th of that week which was Thanksgiving and was his scheduled work day. Thanksgiving is also a scheduled holiday under the Union contract.

The Grievant was not paid for working on the holiday (which is not at issue) and he also did not receive holiday pay which is the issue raised in this grievance.

As noted above, the Grievant did work his last regularly scheduled work day preceding the holiday that week (Wednesday) and he did work his first regularly scheduled work day following the holiday that week (Friday).

RELEVANT CONTRACT LANGUAGE

Article 12, Section (b) of the contract provides:

> (a) Holidays under this Agreement shall be: New Year's Day, Memorial Day, July Fourth, Labor Day, Thanksgiving Day and Christmas Day.
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> (b) To qualify for holiday pay, the employee must be scheduled for work during the week in which a holiday occurs except when the employee is on vacation as elsewhere provided herein. In addition, said employee must work on his or her last regularly scheduled work day preceding the holiday and on his or her first regularly scheduled work day following the holiday. If an employee is on layoff, he or she will qualify for holiday pay if he or she works at any time during the week in which the holiday occurs, or the employee will qualify for the holiday pay if the employee works in the week before the week after the holiday.

The parties have agreed that the provisions of Article 6, Grievance Procedure, of the Contract (Joint Exhibit 1) have been complied with and that the matter is before the arbitrator for decision. The relevant language of the Grievance Procedure in the contract provides as follows:

> (b) In the event a deadlock is reached with respect to a grievance or disagreement, the Union and the Company shall, within five (5) days after such deadlock is reached, select an arbitrator in the following manner: Each party shall pick one representative and shall agree on an impartial arbitrator to act as the chairman of the arbitration board. In the event the parties are unable to agree on an impartial arbitrator, they shall request the Federal Mediation and Conciliation Service to submit a list of seven (7) individuals qualified in the determination of said conciliator to represent the public interest in a labor dispute. Each party to this contract shall then have the right to strike two (2) of the seven (7). The remaining name shall then be the impartial arbitrator. The impartial arbitrator shall reach a decision as soon as possible after the case is submitted; and its decision, when rendered shall be final and binding upon both parties. Each party to this Agreement shall be responsible for its own expenses in connection with any and all grievances or arbitrations, except that the cost of the impartial arbitrator shall be borne equally by both Company and Union.

POSITION OF THE UNION

The Grievant worked more than 32 hours during Thanksgiving week, and thus was eligible for holiday pay, but for the dispute over whether he had to work the holiday. There has been a practice at the Company of not paying an employee holiday pay for a holiday on which the employee was scheduled to work unless the employee worked the holiday, in addition to the scheduled days before and after.

There is no question but that the relevant contract language here is clear, unambiguous, and susceptible of only one interpretation. Thus, the question presented is whether the clear contract language prevails over past practice. Arbitrators and courts have overwhelmingly held, with few exceptions, that clear contract language prevails over contrary past practice.

The Minnesota case of Ramsey County v. AFSCME Local 8, 309 N.W.2d 785, 113 LRRM 2630 (Minn. 1981) does not hold that consistent past practice necessarily trumps clear language. Rather, it holds that under the Minnesota Uniform Arbitration Act, an arbitrator does not exceed his powers in issuing an award based upon past practice where the practice conflicts with the clear contract language. The court found that such an award can "draw its essence" from the contract, and hence should not be vacated by a court. In that case, the arbitrator determined that the past practice of allowing vacation accrual for six appraisers under a more generous pre-contract policy prevailed over the vacation plan set forth in the contract. In addition to the past practice, the arbitrator noted other factors, including evidence that there was an understanding that the contract provisions would be applied only to new appraisers, and that the six appraisers would accumulate the more generous vacation under the old plan because, pursuant to that plan, the appraisers also continued to be paid for overtime at straight time rather than the premium rate applicable to other employees.

The language in this contract requiring employees to work the scheduled day before and after the holiday as a condition of holiday pay eligibility is typical. If the Company wanted to also require employees to work a scheduled holiday as a condition of receiving holiday pay, it could have bargained to include such language in the contract.

The Company raises the specter that if employees scheduled to work a holiday were paid holiday pay whether or not they worked, no one would work on holidays. In fact, employees have strong incentives to work on a scheduled holiday. A full-time employee who works 32 hours during a holiday week, and who then works the holiday, would be paid time-and-a-half (1-1/2) for the work on the holiday (12 hours pay) plus eight hours holiday pay, for a total of 20 hours pay. An employee who does not work the holiday would receive only eight hours of holiday pay. Additionally, an employee calling in absent on the holiday would have four points deducted under the Company's attendance policy. This is not insignificant, because "an employee who loses six (6) points or more becomes a Probationary Employee and forfeits their Paid Personal Day." Additionally, a person who calls in absent even one time forfeits the $100.00 bonus for six months of perfect attendance which the policy provides. Even further, an employee calling in absent would potentially lose the contractual "wellness holiday" which is given annually to employees with excellent attendance records defined, as being absent no more than two shifts per year. Contract, Article 12(f). With all of these incentives for employees to not miss work on scheduled holidays, it is unlikely that the mere receipt of eight hours holiday pay by absent employees would result in massive absences on holidays.

The Company contends that, in addition to the holiday pay language, there were other clear contractual provisions which the parties did not follow. The two examples raised are completely distinguishable. The night compensation provision (Article 14) states that employees "shall receive a night compensation of twenty cents ($.20) per hour." This obviously cannot be interpreted to mean that employees' total wages are only twenty cents per hour because the provision must be read in conjunction with the hourly wage rates set forth in Appendix A.

In addition, while the parties may not strictly follow the procedures for picking an arbitrator set forth in Article 6(b), in that they use a single neutral arbitrator rather than a three person arbitration panel, they deviate from the terms of the contract by mutual agreement. If either party were to ever insist upon following the precise contractual procedure, then that procedure, would have to be strictly followed.

In the present case, the contract language regarding eligibility for holiday pay is absolutely clear, and specific in stating the precise eligibility requirements. The contract states that if an employee works the last scheduled day preceding the holiday and the first scheduled day following the holiday, the employee is entitled to receive holiday pay. There is no requirement that the employee also work on a scheduled holiday. In this situation, as in the case of selection of arbitrators, the Union can insist that the clear contract language be followed regardless of the proper practice.

The Arbitrator should sustain the grievance and rule that the Grievant is entitled to eight hours of holiday pay for the 2004 Thanksgiving holiday; and that in any similar situation arising

after Thanksgiving 2004, the Company must pay holiday pay to otherwise eligible employees who do not work scheduled holidays. If the Arbitrator concludes that the Union was required to notify the Company in advance that it was going to insist on compliance with the clear contract language, the grievance filed in this matter and the discussions in the subsequent grievance meetings serve as such notice. Thus, even if the Arbitrator were to conclude that the Grievant here is not entitled to the 2004 Thanksgiving holiday pay because of lack of prior notice, the Arbitrator should rule that in all situations arising after the filing of the instant grievance, the Company must pay holiday pay to otherwise eligible employees who do not work a scheduled holiday.

POSITION OF THE EMPLOYER

The Grievant is not entitled to holiday pay because:

1. The clear Company practice approved and enforced by the Union for over 25 years is to the contrary. This identical language has been in all of the contracts between the Company and Union for over 25 years and the parties have never interpreted the language as the Union now alleges it should be interpreted.

2. Previous Union officers and a previous Union steward acknowledged and agreed with the Company's interpretation of the language requiring that the employee work on the holiday, if so scheduled, in order to receive holiday pay. The Union's knowledge and acquiescence in that interpretation is controlling.

3. Other contract language is interpreted to follow past practices and common sense.

4. Virtually all arbitration authority requires that the language of the contract be interpreted to follow the intent of the parties. The principal purpose that the parties intended to be served is the proper interpretation of the contract language.

Past Practice. Ms. Darlene Lehman has been in charge of Company payroll practices at the St. Cloud facility for over 27 years. She testified that the language of Article 12, Section (b) has been in all of the Union contracts during the 27 years that she held her position.

Ms. Lehman, without challenge from the Union, testified that she has always required that an employee work on the holiday, if it is a regularly scheduled work day in order to qualify for holiday pay. In fact, production employees work on most of the scheduled holidays because it is required in the Company's bread business.

Union Knowledge and Acquiescence. Steve Peterson was the Union steward for 17 years until May of 2000. As a former Union steward and former employee of the Company, Peterson was subpoenaed to testify.

He testified that, to the best of his knowledge, no employee ever received holiday pay if that employee failed to work on the holiday when it was an employee's regularly scheduled work day.

Peterson further testified he recalled a situation identical to the instant grievance in which he, as the Union steward, and Union officers, discussed a potential grievance of another employee some years ago in which that employee claimed that he was entitled to holiday pay because he worked the day before and the day after the holiday, but did not work the holiday which was his scheduled work day. Peterson met with the Union officers and agreed that they would not file a grievance challenging the Company's refusal to provide holiday pay in an identical situation to the grievance raised here.

Other Contract Language. As to the "technicality" of admittedly imprecise contract language, the parties did not literally apply the language of Article 14, Night Compensation, which states:

NIGHT COMPENSATION

> (a) Employees working between 6:00 p.m. and 6:00 a.m. shall receive a night compensation of twenty cents ($.20) per hour for each hour worked during that period of time.

Literally, that language means that any employee working between the hours of 6:00 p.m. and 6:00 a.m. would be compensated twenty cents ($.20) per hour for each hour worked. Clearly that was not the intent of the parties. The intent was to provide a premium of twenty cents ($.20) per hour in addition to the regular hourly rate.

Intent of the Parties. The key to proper interpretation of language in a union contract is to determine the purpose that the parties intended. As stated in Elkouri, "How Arbitration Works," Sixth Edition, at page 461:

> Judicial doctrine recorded in the Restatement (Second) of Contracts holds that when the principal purpose that the parties intended to be served by a provision can be ascertained, the purpose is to be given great weight in interpreting the words of the provision. Arbitrators agree that an interpretation in tune with the purpose of a provision is to be favored over one that conflicts with it.
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> In Associated Fur Manufacturers, 85 LA 810, 811, the arbitrator stated:
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> [a] collective bargaining agreement is not a painting in still life. It is a document which tries to portray a living-together relationship of two parties who are interested in "mutual survival." In that context, the arbitrator commented on the interpretation urged by the union as follows: "[It would] put a wholly unnatural premium upon excessive technicality and…ignore the manifest intent of the [parties].

In the case of Teamsters Local 662 and Associated Milk Producers, Inc., arbitrator William Strycker in a 1993 case disagreed with the union position that the contract language regarding sick leave was clear and should be taken at its plain meaning. The arbitrator stated at page 6 of that decision:

> The arbitrator's primary responsibility in construing contract language is to give effect to the intent of the parties.

The Union also argued in that case that the current union business agent was not aware of the consistent past practice which favored the employer's interpretation of the contract. The arbitrator held that during the fifteen (15) years in which the contract language was in effect, certain local union officers and employees were well aware of the known practice.

DISCUSSION AND OPINION

No material facts remain in dispute. The record shows that the Company has never paid for holidays not scheduled and actually worked for all the years that the terms of Article 2, Section (b) have appeared, unchanged, in the collective bargaining agreement. The Company relies on this long established and mutually understood past practice to counter the Union's claim that the following language requires the payment of holiday pay under the facts of the case:

> To qualify for holiday pay, the employee must be scheduled for work during the week in which the holiday occurs except when the employee is on vacation as elsewhere provided herein. In addition, said employee must work on his or her last regularly scheduled work day preceding the holiday and on his or her first regularly scheduled work day following the holiday.

The first proposition requiring determination therefore asks whether the language of Section (b) is, as the Union contends, clear and unambiguous on its face? The short answer is that the terms of Section (b) are clear and plainly drawn leaving no room for ambiguity.

The provision states its purpose in the opening phrase "To qualify for holiday pay" and goes on to list the only eligibility requirements, i.e., "be scheduled for work during the week the holiday occurs…[and] must work on his or her last regularly scheduled work day preceding the holiday and on his or her first regularly scheduled work day following the holiday."

Conspicuously absent from the inclusive listing of qualifiers for holiday pay entitlement is any mention of working the holiday. A fundamental standard of contract interpretation holds that "to express one thing is to exclude another." In the context of the language of Section (b), this principle means simply that by not including working on the holiday among the listed requirements for holiday pay, the terms of the provision mean to exclude such requirement.

Established principles of contract interpretation, indeed, go further to advise that the reading into contract language, a term or terms otherwise excluded amounts to an impermissible act of contract legislation in the guise of interpretation.

Notwithstanding this fundamental standard of contract interpretation, the Company correctly argues that arbitration awards can be found that conclude long established and mutually accepted past practice can be a better guide to the parties' intent than can clear contract language to the contrary. The Company offers the Associated Milk Producers case in support of its argument that past practice may, in given situations, override clear language as the main interpretive aide to the parties' intent.

In Associated Milk, however, Arbitrator Strycker pointedly relies on his finding that "since there are at least two reasonable interpretations…I conclude that that the sick leave language is ambiguous." Accordingly, Arbitrator Strycker concluded that the "contract ambiguity should be resolved in the Employer's favor, based upon the persuasive past practice present here." In effect, the Associated Milk Producers decision supports the Union's position in the instant matter, i.e., that past practice does not come into play as an indicator of mutual contractual intent unless and until ambiguity can be found in the disputed language.

In the case at hand, no such ambiguity occurs in the governing language of Section (b). Therefore, if the Employer's position is to prevail here, some persuasive argument must be presented which would justify concluding that the past practice of not paying for holidays which are not worked should trump the clear contract language which conspicuously omits listing such a qualifier for holiday pay eligibility.

The Company argues, in this regard that the past practice must override the clear language as the true indicator of the parties' intent because of the special production needs of the bread business. In essence, the Company argues that without the incentive of holiday pay premium for time actually worked, so many employees might choose not to work the holiday as to jeopardize meeting production goals. In view of the competitive realities of the bread business, the Company contends such failure to meet customer demand could cost the erosion of market share.

This line of argument, however, ignores other strong incentives for employees to work on scheduled holidays. The labor contact provides that a full-time employee who works 32 hours during a holiday week would receive time and one-half for the holiday (12 hours pay) plus the eight hours holiday pay for a total of 20 hours pay. By contrast, an employee who does not work the scheduled holiday would receive only the eight hours of holiday pay under the unambiguous terms of Section (b).

Employees who do not work a scheduled holiday further would have four points deducted for the absence under the Company's attendance policy. Two more absences puts such employees at six (6) points which results in the penalty of becoming a "Probationary Employee and forfeits their Paid Personal Day." Additionally, an employee who calls in absent even one day forfeits the $100 bonus for six months of perfect attendance under the policy.

Finally, the employee calling in absent would risk losing the contractual "wellness holiday" given annually to employees with "excellent attendance" records defined under Article 12 (f) as being absent no more than two shifts per year. The necessary conclusion is that, with

this package of incentives in place, it would be unlikely for many employees to opt out of working a scheduled holiday for so slight a trade off as a mere eight hours of unworked holiday pay.

The Company's final argument that Section (b) shouldn't be interpreted and applied literally because certain other contractual language is not so narrowly construed also lacks merit. The two examples offered simply fail to make the point.

The night compensation language provides that employees "shall receive a night compensation of twenty cents ($.20) an hour." Obviously, this language cannot be read literally because no rational employee would agree to work for such a ridiculous hourly sum. Thus no shadow of ambiguity can be seen in these terms of contract since only one logical interpretation can be drawn here.

In like vein, the archaic procedures for selecting an arbitrator provided for in Article 6 (b) continues to appear in labor contracts which are routinely ignored by mutual waiver. The important consideration in this regard is that if either party insisted that a three person arbitration panel be used, the black letter of Article 6 (b) would then have to be strictly applied.

At the hearing, I advised the parties to review the lessons of Ramsey County v. AFSCME Local 8 (MINN 1981) in terms of case law pertaining to favoring past practice over clear contract language. The distinguishing features of Ramsey County have not been met in the instant matter.

The court found in that case that the arbitrator properly noted evidence that the new contract was intended to apply revised vacation accrual language only to new hires and therefore that past practice of accrual procedures would apply to six already employed employees under the previous plan.

No such independent factors are present in the instant matter. In point of fact, my research in arbitration where past practice has trumped clear contract language has consistently revealed the presence of extrinsic factors which explained these rare departures from the logic behind looking to clear language as the best guide to contractual intent.

The true rule in situations where a party chooses to insist on strict compliance with clear contract language which has not previously been enforced requires timely notice of intent to invoke the right or benefit so guaranteed. The same notice is required of an employer who has been lax in enforcement of some written rule of conduct – the right to resurrect a rule which has lain fallow merely needs due and timely notice of intent to enforce the rule as of a future date.

In the present case, the filing of the instant grievance suffices as timely notice but only as to future holidays. In short, the benefit cannot be claimed by this Grievant but will only apply to all future holidays.

DECISION

The grievance is sustained as to holidays occurring after the issuance of this award.

2/3/06
Date

John J. Flagler, Arbitrator